In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 70-288

A. ZERKOWITZ AND CO., INC., PETITIONER

v.

UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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1. The narrow question presented by the petition is whether tennis shoes which petitioner imported from Japan between 1958 and 1960 were properly appraised for duty purposes upon the basis of the American selling price ("ASP") of a like or similar domestic article (Pet. 5). Without dissent on this issue, the courts below, which were specifically established to resolve customs disputes, held that the ASP basis was proper. The issue is of limited significance

inasmuch as ASP valuation applies to only four products and, of these, only rubber-soled footwear is not subject to an international agreement to eliminate the ASP basis in return for reciprocal trade concessions. H.Rep. No. 91-1435, 91st Cong., 2d Sess. 51-52. Congressional authorization for modification of the tariff schedules to effect the agreements with respect to the other three products is now pending. See, *e.g.*, Section 331, H.R. 20, 92d Cong., 1st Sess.

2. In any event, the courts below correctly upheld the ASP valuation. In 1933, Presidential Proclamation No. 2027, 47 Stat. 2552, T.D. 46158, 63 Treas. Dec. 232, issued pursuant to 19 U.S.C. 1336, established ASP valuation for rubber-soled footwear of the type petitioner imported. The United States duty on such footwear imported from Japan was reduced to 20 percent ad valorem in 1955 by the Protocol of Terms of Accession of Japan to the General Agreement on Tariffs and Trade, 6 U.S.T. 5833, T.I.A.S. No. 3438, T.D. 53865, 90 Treas. Dec. 234. Petitioner contends (Pet. 5) that this trade agreement renders ASP valuation inoperative because 19 U.S.C. 1352(a) provides:

> The provisions of section 1336 of this title shall not apply to any article with respect to the importation of which into the United States a foreign-trade agreement has been concluded pursuant to this part * * *.

Petitioner also relies upon 19 U.S.C. 1402(a), which authorizes an ASP valuation only "[i]n the case of an article with respect to which there is in effect under section 1336 of this title a rate of duty based upon

the American selling price of a domestic article * * *" (Pet. 8).

In rejecting petitioner's contentions, the courts below properly held:

> The controverted portion of 19 U.S.C. 1352(a) is prospective, barring use of the section 1336 procedures to undo what has been done by a foreign-trade agreement; it does not, in itself, nullify changes in rates of duty, classification, or bases of appraisement brought about by previous use of the section 1336 procedures. [Pet. 5a; *see also*, Pet. 19a, 54a.]

As the courts below also held (Pet. 6a, 20a, 58a), the reduction in the *rate of duty* pursuant to the Japanese trade agreement did not abrogate the ASP *basis of valuation* established in Presidential Proclamation 2027; therefore, when petitioner imported the tennis shoes, there was "in effect under section 1336 * * * a rate of duty based upon the American selling price of a domestic article" 19 U.S.C. 1402(a).

These holdings are also supported by other considerations. First, the Japanese trade agreement explicitly provides that the basis specified in Presidential Proclamation 2027, *i.e.*, the ASP, is applicable to rubber-soled footwear. 6 U.S.T. at 5890, T.I.A.S. No. 3438 at 58, T.D. 53865, 90 Treas. Dec. at 256. Second, in amending the footwear tariff provision in 1954 and 1958, Congress twice ratified the use of ASP valuation (Pet. 56a-57a). The current footwear provision, enacted after the importations here in issue, expressly continues the ASP valuation. Schedule 7, T.S.U.S., headnote 3(b), Subpart A, Part 1,

19 U.S.C. 1202. Finally, the decisions below are consistent with the decision in *Albert F. Maurer Co.* v. *United States*, 47 Cust. Ct. 560, 575, Reap. Dec. 10130, affirmed, 50 Cust. Ct. 539, A.R.D. 153, affirmed, 51 C.C.P.A. 114, C.A.D. 845. For these reasons, as well as for the others relied upon by the courts below (Pet. 18a-19a, 20a, 54a, 56a, 57a), the "unbroken practice of the Executive, the Congress, and [the Customs Court]" required the courts below to reject petitioner's "debatable grammatical construction" (Pet. 58a) of the statutory provisions at issue.

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

JULY 1971.

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